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Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois.

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April 17, 2000

The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) and Section 761.430 of the Arbitration Practice Rules for Telephone Utilities (83 Ill. Admin. Code 761.430) , respectfully submits its Reply to Briefs on Exceptions to the hearing Examiners' Proposed Order (hereafter "HEPO"), in the above-captioned matter.

Focal's Brief on Exceptions

Issue No. 3 - Enhanced Extended Links (EELs)

Focal takes two exceptions to the HEPO. First, it takes exception to the HEPO's finding that "Focal should not be allowed to count ISP bound traffic as local exchange service in self certifying that it will be providing a significant level of local exchange service through an EEL. " Focal Brief on Exceptions at 3-7, *taking exception to HEPO* at 13. Next, it takes exception to the HEPO's finding that Ameritech need not notify Focal in advance regarding any changes it makes to conditioned loops provisioned by Ameritech. Focal BOE at 8-9, *taking exception to HEPO* at 16. These exceptions will be treated in turn.

First, Focal asserts that ISP-bound traffic should be treated as local for purposes of self-certification to satisfy the requirement in the Supplemental Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (November 24, 1999). In support of this, Focal asserts that Internet-bound traffic is treated as local for "all regulatory purposes," and that the Staff

"has also taken the position that Internet-bound calls should be treated as local for EELs purposes." Focal BOE at 4, n.2.

Neither of these statements is correct. The FCC, as has been seen, clearly does not treat ISP-bound traffic as local for *all* regulatory purposes. It is true that "neither the FCC nor the joint Ex Parte letter cited in the Supplemental Order required the requesting carrier to self-certify that ISP calls will not be treated—for purposes of tabulating the extent of local traffic—as local." Staff Exhibit 3.0 at 9. However, this does not amount to treatment as local for "all regulatory purposes. Instead, it is clear that the FCC has declined to rule on this particular issue.

As the Staff has also pointed out, and the HEPO apparently recognizes, the treatment of ISP traffic by the FCC and courts has been ambiguous. Staff Initial Brief at 17; HEPO at 11, 13. The FCC declared ISP traffic to be interstate in its Declaratory Ruling in CC Docket 96-98; the federal Court of Appeals for the D.C. Circuit, in vacating this Ruling, specifically declined to characterize the traffic as local or interstate, stating that it has some of the characteristics of both. Bell Atlantic v. FCC, No. 99-0194 (D.C. Cir., March 24, 2000) (slip opinion at 8). There is no real consensus regarding the characterization of this traffic, which is precisely the problem.

Further, the Staff has not, in this proceeding, ever "taken the position that Internet-bound calls should be treated as local for EELs purposes." Staff witness John Garvey testified regarding this issue, and he stated that:

Focal should not have to self-certify that they are treating Internet access calls as interstate. Instead, they should only be required to self-certify that their tabulation of traffic is consistent with state and federal laws, rules and regulations. This

statement makes no legal conclusions that may impact future judicial or administrative proceedings.

Staff Exhibit No. 3.0 at 9 (emphasis added).

The Staff further stated, in its Initial Brief in this matter, that “Staff does not expect that Focal will treat ISP calls as local for this purpose, in light of the D.C. Circuit’s statement that such traffic’s character is profoundly ambiguous, and its remand to the FCC to characterize the traffic.” Staff Initial Brief at 17. The HEPO correctly noted this. HEPO at 13. It is difficult to see how this could be construed as agreement with the proposition that this traffic is local for this purpose. The Staff has never varied from its position that it would be inappropriate for Focal to treat ISP bound traffic as local for this purpose. Rather, Staff simply has argued that Focal should not be required to certify its treatment of this traffic since neither the FCC nor this Commission has imposed such a requirement.

Thus, Focal’s argument that “[t]he FCC has consistently treated calls to [ISPs] as local calls[;]” Focal BOE at 3-5, should be discounted.

Focal next asserts that, even if the Commission concludes that the FCC has not determined ISP traffic to be local, it can, and should, determine that ISP traffic is local for certification purposes. Focal BOE at 6. It asserts that the Commission has the authority to do this pursuant to Section 13-505.6 of the Public Utilities Act, 220 ILCS 13-505.6, which, it asserts, “provides the Commission independent authority to require more that the FCC has required[;],” and therefore “th[e] Commission may determine that

Internet-bound calls should be treated as local for purposes of EELs notwithstanding any ruling by the FCC.” Id.

Section 13-505.6, however, does not provide any such grant of authority. It provides that:

A telecommunications carrier that provides both noncompetitive and competitive telecommunications services shall provide all noncompetitive telecommunications services on an unbundled basis to the same extent the Federal Communications Commission requires that carrier to unbundle the same services provided under its jurisdiction. The Illinois Commerce Commission may require additional unbundling of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act.

This provision clearly permits the Commission to order the unbundling of services other than those which the FCC has ordered unbundled. This is, of course, fully consistent with the UNE Remand Order. Under that Order, state public utility commissions may add elements to the national list of elements required to be unbundled, *provided that the unbundling of such elements can be accomplished in compliance with sections 252(d)(3)(B) and (C) of the Act, 47 U.S.C. §252(b)(3)(B), (C). Third Report and Order and Fourth Further Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, CC Docket 96-98; FCC No. 98-238, ¶153.

, In its Supplemental Order, the FCC specifically prohibited carriers from utilizing UNEs to bypass special exchange access services, until resolution of its Fourth Notice of Proposed Rulemaking, which addresses the issue. *Supplemental Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; FCC No. 99-370, ¶2. However,

this prohibition is waived for carriers that “use[] combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.” Id. In other words, the FCC has specifically prohibited the use of UNEs as substitutes for special access services, but created an exception for carriers which meet certain requirements. Focal, however does not seek a declaration by the Commission that a new element¹ should be unbundled, but rather, a declaration by the Commission that a group of loop and transport elements which the FCC has specifically ordered not be unbundled except under certain circumstances, be unbundled under circumstances other than those the FCC has described. It is difficult to see how Section 13-505.6 permits this.

Finally, Focal argues, as it has throughout this proceeding, that it is technically infeasible to distinguish between local voice and ISP traffic. Focal BOE at 7. The Staff disputes this, and notes that other state Commissions have, by declaring that ISP traffic is not local, implicitly ordered it. However, Focal cannot have it both ways. If its alleged inability to segregate ISP and voice traffic prevents it from doing so for purposes of purchasing EELs, as it clearly would here, then it is compelled to do without certain EELs. Perhaps under such circumstances it will perhaps find a way to segregate such traffic, despite its assertions that this is technically infeasible.

¹ The FCC declined to identify EELs as discrete network elements subject to being unbundled. UNE Remand Order, ¶478. Arguably, this defeats Focal’s argument *ab initio*. However, the FCC further noted that ILECs were required to provide access to EELs regardless of their characterization, in light of the fact that EELs are composed of several loop and transport elements, which must themselves be offered on an unbundled basis. Order, ¶480.

Issue No. 7 - Changes to Conditioned Loops

Focal next takes exception to the HEPO's refusal to require Ameritech to notify it in advance regarding any changes Ameritech makes to conditioned loops provisioned by Ameritech. Focal BOE at 8-9. Focal, it appears, considers the flagging of conditioned loops to be inadequate, inasmuch as it contends that Ameritech is unwilling to comply with the notice requirements set forth in 47 CFR § 51.325. Id. Section 51.325 provides that:

- (a) An incumbent local exchange carrier ("LEC") must provide public notice regarding any network change that:
 - (1) Will affect a competing service provider's performance or ability to provide service;
 - (2) Will affect the incumbent LEC's interoperability with other service providers; or
 - (3) Will affect the manner in which customer premises equipment is attached to the interstate network.
- (b) For purposes of this section, interoperability means the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.
- (c) Until public notice has been given in accordance with Secs. 51.325 through 51.335, an incumbent LEC may not disclose to separate affiliates, separated affiliates, or unaffiliated entities (including actual or potential competing service providers or competitors), information about planned network changes that are subject to this section.
- (d) For the purposes of Secs. 51.325 through 51.335, the term services means telecommunications services or information services.

This section appears to require that public notice be given before an ILEC may disclose information about planned network changes to its affiliates. This is clearly not at issue here. In addition, the notice is to be given to the FCC, or, alternative to the FCC and also through "industry fora, industry publications, or

the carrier's publicly accessible Internet site." 47 CFR § 51.329. This rule clearly does not contemplate individual notice to each affected carrier. Accordingly, Focal's exceptions should be discounted.

Ameritech's Brief on Exceptions

Ameritech takes exception to considerably more of the HEPO than does Focal. *See, generally*, Ameritech BOE. The Staff will comment upon several of Ameritech's exceptions.

Issue No. 2 - Reciprocal Compensation for ISP-bound Traffic

Ameritech excepts to the payment of any reciprocal compensation to Focal for ISP-bound traffic. Ameritech BOE at 20, *et seq.*

Ameritech asserts that the Staff's proposal that Focal receive intercarrier compensation at an adjusted end-office rate of \$0.001333 per minute of use, while having some merit, ought to be substantially modified. Ameritech BOE at 13-16. It views the rate proposed by the Staff as being inappropriate as a rate to extend over the duration of the parties' interconnection agreement. Ameritech BOE at 14. It proposes, to the extent that it is in fact compelled to pay Focal intercarrier compensation, a rate of \$0.000946, which it submits is equal to the tandem switching element of reciprocal compensation. *Id.* at 14-15. It further argues that this rate should be subject to adjustment at the end of one year. *Id.* at 15.

Ameritech argues that Focal is not entitled to the composite tandem switching rate for routing ISP traffic, which includes the following rate elements: end office local switching, tandem switching, tandem transport termination, and tandem transport facility mileage. Ameritech believes that Focal is entitled only to an adjusted tandem switching

rate element, which excludes three of the four above listed rate elements . What Ameritech ignores, however, is that if Focal's switch acts as a tandem switch when routing ISP traffic, it is entitled to all of the rate elements that comprise the composite tandem switching rate (not just the tandem switching element alone). However, as the Staff has shown, Focal's switch does not act as a tandem switch when routing ISP-bound traffic. Therefore, the adjusted end office switching rate element is a more accurate proxy for Focal's costs than either Ameritech's adjusted tandem switching rate element or Focal's proposed composite tandem switching rate.

The Staff remains convinced that the rate it proposes, based upon an adjusted end-office rate, is the most appropriate rate. See Staff Exhibit No. 2.0 at 17. In routing ISP-bound traffic, Focal's switch functions in a manner akin to an end-office rather than a tandem switch, because it does not aggregate and disperse traffic to a large number of divergent locations, but rather to a small number of convergent locations, and in a significant number of cases, to collocated equipment. Staff Exhibit 2.0 at 12; Focal Exhibit No. 2.1 at 11. Likewise, its costs must be presumed to be lower than its local voice costs². Staff Exhibit 2.0 at 11. However, there does not appear to be any basis for compensating Focal based upon the tandem switching element component, which, as Ameritech concedes, is based upon at least a partial application of its "cost-causer

² Focal's failure to introduce, or indeed apparently to undertake any cost studies, see Focal Exhibit No. 2.0 at 48 are fatal to its objection to Staff witness Phipps' conclusion that its ISP costs are lower than its local voice costs. It is well established that the failure of a party to come forward with facts which are peculiarly within his knowledge gives rise to a presumption that such facts, if produced, would be unfavorable to his cause. Shumak v. Shumak, 38 Ill. App. 3d 188, 190; 332 N.E. 2d 177 (2nd Dist. 1975). Focal's failure to make its costs known in the course of this proceeding forecloses its argument that they are higher than Ameritech's, and indeed permits adverse inferences to be drawn regarding whether they are indeed higher than Ameritech's.

pays” model. Ameritech BOE at 14-15. The Staff’s recommendation of compensation at an adjusted end-office rate is reasonable, just, and takes into account a fair estimate of Focal’s actual costs based upon the only available proxy. It should be adopted.

Issue No. 2 - Reciprocal Compensation for Voice Traffic

Ameritech further takes exception to the HEPO’s finding that it must pay Focal the tandem rate for voice traffic. In support of this exception, Ameritech argues that Focal has not satisfied federal requirements which permit it to charge the composite tandem switching rate for terminating local voice traffic. Ameritech BOE at 24 *et seq.* Ameritech argues that Focal must meet both a geographic coverage test, and a functionality test to obtain compensation at the tandem rate. *Id.* at 24-31. Ameritech argues that Focal has not met the functionality test, and should not, therefore receive the tandem rate. *Id.* at 31.

The Staff, while concurring in Ameritech’s conclusion that Focal must meet both the geographic coverage and functionality tests, believes that Focal has in fact, met both tests.

Application of the tandem exemption requires “states [to] consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC’s tandem switch.” Local Competition Order, ¶ 1090. This obviously calls for a significant exercise judgement, and an inquiry into the nature of Focal’s network.

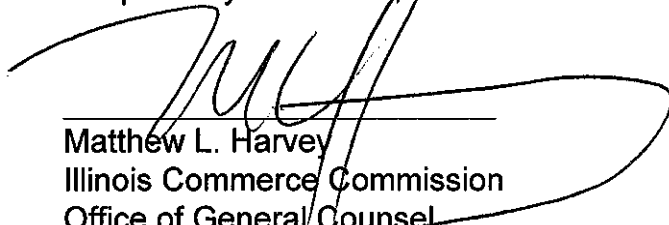
It appears from the evidence adduced subsequent to the filing of Staff witness VanderLaan’s Verified Statement, and at hearing that, when terminating local voice

traffic, Focal's network performs functions reasonably similar to Ameritech's tandem switches. Focal appears to lease enough fiber transport to qualify. For example, Focal serves some customers by placing SONET switching equipment in the customer's building, and using building facilities to connect to the customer premises. Focal Exhibit No. 1.11 at 3. Calls terminating through this architecture are carried from the point of interconnection with the carrier on whose network the call was originated to Focal's switch, and then over Focal's facilities to the SONET node in the building, and thus to the interbuilding facilities to the customer premises. Id.

It should perhaps be noted, however, that, as Focal does not actually switch traffic twice, and there is accordingly little danger that Focal will be undercompensated by the tandem rate, and perhaps some danger that it will be overcompensated. Should the former be the case, Focal may, of course, submit cost studies.

WHEREFORE , the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,



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April 17, 2000

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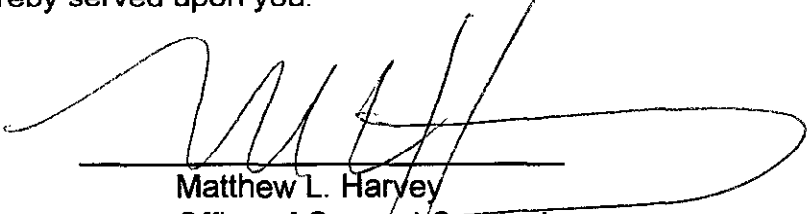
STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Focal Communications Corporation)	
of Illinois)	
)	00-0027
Petition for Arbitration Pursuant to Section)	
252(b) of the Telecommunications Act of)	
1996 to Establish an interconnection)	
Agreement with Illinois Bell Telephone)	
Company d/b/a Ameritech Illinois.)	

NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that on this 17th day of April, 2000, I have filed with the Chief Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois, the Brief on Exceptions of the Staff of the Illinois Commerce Commission, a copy of which is hereby served upon you.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Notice, together with copies of the documents referred to therein, have been served upon the parties to whom the Notice is directed by messenger, electronic mail, facsimile and/or first class mail, proper postage prepaid, from Chicago, Illinois on the 17th day of April, 2000.



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SERVICE LIST

Docket # 00-0027

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Updated 3-27-00

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